

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DONALD J. MCKAY and KRISTERNE MCKAY,

Plaintiffs-Appellants,

v

ROBERT J. FERENSIC and CITY OF INKSTER,

Defendants-Appellees.

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UNPUBLISHED

September 22, 1998

No. 201294

Wayne Circuit Court

LC No. 96-619271 NI

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition. We vacate the judgment below and remand for further proceedings.

This case arises out of a collision that occurred on November 24, 1995, between plaintiff Donald McKay, who was driving an all-terrain vehicle (ATV), and Inkster police officer Robert Ferensic, who was driving a patrol car. The collision caused plaintiff<sup>1</sup> to strike a utility pole, resulting in severe injuries.

Ferensic testified at deposition that he observed four ATVs racing down a street, moving against traffic and across lawns, and disregarding several stop signs. According to Ferensic, he pulled up to the last of the ATVs, which was driven by plaintiff, and, with siren and lights activated, yelled to plaintiff to pull over. Ferensic stated that plaintiff ignored his commands and continued to drive. Plaintiff testified at deposition that he was not with the other ATVs and was in fact traveling well behind them. Plaintiff stated that he heard no sirens or voices and saw no flashing lights, and that Ferensic drove his patrol car up to plaintiff's ATV, then ran his car into it.

Plaintiff was initially charged with fleeing and eluding, but later accepted responsibility to running a stop sign, a civil infraction.

Plaintiff filed his claim in circuit court, alleging that Ferensic was grossly negligent while acting in the course of his employment as a police officer, and that the city of Inkster was liable to him for Ferensic's negligent operation of a government-owned vehicle. Defendants moved for summary

disposition under MCR 2.116(C)(7) (claim barred by governmental immunity) and MCR 2.116(C)(10) (no genuine issue as to any material fact, defendants entitled to judgment as a matter of law). The trial court granted the motion but gave no reasons for doing so. The parties have focused on the issues of whether Ferensic had a legal duty to plaintiff, and whether Ferensic's conduct constituted negligence or gross negligence.

In deciding a motion under MCR 2.116(C)(7), the court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence presented to it. MCR 2.116(G)(5). To defeat a motion for summary disposition, the plaintiff must allege facts giving rise to an exception to governmental immunity. *Terry v Detroit*, 226 Mich App 418, 428; 573 NW2d 348 (1997). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for the claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 210 (1998). A court must consider all the documentary evidence before it to ascertain whether there is a genuine question of material fact that should be resolved at trial. *Id.* In deciding motions for summary disposition, the court "may not make factual findings or weigh credibility." *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993).

This Court reviews a trial court's decision on a motion for summary disposition de novo as a matter of law. *Miller v Farm Bureau Mutual Ins Co*, 218 Mich App 221, 233; 553 NW2d 371 (1996). However, in this case we are unable to perform this function, because the record below contains nothing whatsoever as to the trial court's reason/basis for granting defendants' motion.

Because the trial court provided no explanation, we cannot rule on the propriety of the disposition below unless we decide the motion ourselves. However, we believe it is more appropriate to allow the trial court another opportunity to hear and decide the motion for summary disposition. Accordingly, we vacate the judgment below and remand to the circuit court for further proceedings.<sup>2</sup> Defendants are free to raise and litigate anew their motion for summary disposition.

Judgment vacated, remanded for further proceedings. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Jane E. Markey

/s/ Peter D. O'Connell

<sup>1</sup> Because Donald McKay is the injured party, and Kristerne McKay's claim is derivative, in this opinion "plaintiff" refers solely to Donald McKay.

<sup>2</sup> Because Judge Talbot has since left the circuit bench, we do not have the option of simply remanding for explanation from the court as to its basis for granting defendants' motion.